



Technology in Practice: Upsides, Downsides and Best Practices

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Ethics of Secure Communication



Colorado Rules of Professional Conduct

Colo. RPC 1.1

Rule 1.1 Competence

- Rule 1.1 states “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- Comment 8 to Rule 1.1 states “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and changes in communications and other relevant technologies, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. See Comments [18] and [19] to Rule 1.6.
- Lawyers have a duty to safeguard their clients’ information even in cyberspace. The duty of competence requires that attorneys know what technology is necessary in their practice and how to use it.

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Colorado Rules of Professional Conduct

Colo. RPC 1.4

Rule 1.4 Communication

- Rule 1.4 states that a lawyer shall “reasonably consult with the client about the means by which the client's objectives are to be accomplished” including the use of technology.
- A lawyer must keep the client informed and may require obtaining a client’s consent to use certain technologies.
- A lawyer should notify a client in the event that there has been any compromise of the client’s information.

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Colorado Rules of Professional Conduct

Colo. RPC 1.6

Rule 1.6 Confidentiality of Information

- Rule 1.6 states “A lawyer shall not reveal information relating to the representation of a client....”
- Comment 18 to Rule 1.6 states that a lawyer must “make reasonable efforts to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. ”

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Colorado Rules of Professional Conduct

Colo. RPC 1.6

Rule 1.6 Confidentiality of Information

- Comment 19 to Rule 1.6 states “When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.”
- If you use email to communicate with clients, do you advise clients regarding the potential risks of email communication?

Ethics of Secure Communication



Sample Fee Agreement language

Cell Phones and Email: No one can guarantee the security of cellular phones and/or electronic mail. If using a cell phone or Client's home phone, if cordless, Client is advised that there is a risk of interception with these forms of communication and therefore a risk to confidentiality. If the Client chooses to communicate with the Firm in that way, the Client is aware of the dangers of being overheard or having the conversation intercepted. By using email, Client is advised that there is a slight risk of confidentiality being compromised by (a) internet service provider's legal, though qualified, right to monitor email passing through or temporarily stored in its network; and (b) the illegal interception of email by the service provider or by "hackers." The Firm will not call the Client on a cell phone and will not use email without the Client's permission. If the Client gives a cell phone number to the Firm or the Firm receives email from the Client, the Firm will assume that the Firm may respond by email or from or to a cell phone.

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Sample Fee Agreement language - continued

Client's Mailing Address and Email Address: If Client wishes, you may receive documents regarding your case by email rather than through the mail from _____ (“Firm”). Documents may include correspondence to and from our office, pleadings, disclosures, and discovery. An Email Agreement is attached. Please sign the attached Email Agreement if you wish to receive documents regarding your case by email.

If Client does not wish to receive documents regarding your case by email or if documents are provided by mail, Client will accept mail at the following address without restriction until otherwise indicated in writing to the Firm: _____.

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Sample Email Agreement

If you wish, you may receive documents regarding your case by email rather than through the mail from _____ (“Firm”). Documents may include correspondence to and from our office, pleadings, disclosures, and discovery.

Please review this Email Agreement and advise us if there are any issues you wish to discuss or clarify.

As attorneys, we are under an ethical obligation to maintain the confidences and secrets of our clients. We must also take reasonable steps to ensure against the inadvertent disclosure of confidential information. We may not disclose this information unless the client gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation of the client. Exceptions to confidentiality include preventing bodily harm to the client or others, to prevent a client from committing a crime or fraud, and to comply with the law or Court Order.

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Sample Email Agreement – continued

At our Firm, we have policies and procedures in place to protect the confidentiality of sensitive communications with our clients. However, there is the possibility that email can be intercepted by unauthorized parties.

If you would like to receive documents regarding your case by email rather than through the mail, please sign this Email Agreement and return it to the Firm.

If at any time either you or we feel that a particular communication is too sensitive, alternative means will be used. Client will accept email at the following address without restriction until otherwise indicated in writing to the Firm:

Email address to be used for Client: _____.

Ethics of Secure Communication



Sample Email Agreement – continued

The Firm appreciates the opportunity to be of service to you.

The above and foregoing Email Agreement is accepted by me on this ____ day of ____,
2021.

BY:

[client name]

Preparing Yourself for Remote Proceedings/WebEx



Camera – consider the view

- Check your camera view on your desktop or laptop prior to signing into WebEx
- Improve your lighting – make sure that there is no light directly behind your head; close the blinds; illuminate your face, have a light in front of you or face a window
- Avoid the “nose-cam” – raise the camera to eye level; put the laptop or desktop securely on a large book
- Tidy up the background – remove the stacks of files, boxes, empty pizza boxes, etc.

Preparing Yourself for Remote Proceedings/WebEx



Audio/visual issues

- ❑ Consider using earbuds with a built-in microphone so that you can hear more clearly and you can be heard more clearly by the Court
- ❑ Try to be hard-wired into your internet connection rather than on Wi-Fi, which could lose strength
- ❑ Do not get lazy in your appearances before the Court. There is no excuse for calling in by phone when you can appear by video. Having a computer is being part of a lawyer in 2020 – and so is having video access.
- ❑ Turn your camera on as Counsel despite the fact it may be a brief appearance before the Court. The Court will appreciate “seeing” you.
- ❑ If you are waiting for your case to be called, mute yourself and consider turning your camera off. Be aware that if you are multi-tasking (working on your computer, shuffling papers), everyone can see you and hear you unless you are muted and your video is off.
- ❑ Avoid feedback; do not use a speakerphone

Preparing Yourself for Remote Proceedings/WebEx



Exhibits

- Make sure that your Exhibits have been accepted by E-Filing so that they are available to the Court; if your Exhibits have not been accepted by E-Filing, you may need the Court or Clerk's email handy so you can email them during the Hearing if requested by the Court.
- Make sure that your client and any witnesses has access to (i.e. Dropbox, Google Docs) your Exhibits and the Opposing Party's Exhibits or copies of all of the Exhibits including the Exhibits for the other Party.
- Know how to Share Content on WebEx; you may want to share Application rather than your share your Screen

Preparing Yourself for Remote Proceedings/WebEx



Other Hints

- ❑ Mute or turn off your personal cell phone -- assuming you are appearing by computer or laptop and not on your cell phone
- ❑ Put your office phone on Do Not Disturb (so it does not ring during the Court proceeding)
- ❑ Remember to speak one person at a time and pause 1 to 2 seconds prior to speaking in case there is an audio or video lag
- ❑ If you are muted, instead of trying to keep your cursor on the Mute/Unmute button to object, you can press and hold the space bar to temporarily unmute yourself. When the space bar is released, you will resume being muted again.
- ❑ Consider whether Court or Clerk needs an alternate number to contact you? i.e. your personal cell phone
- ❑ Turn off other programs running in the background to help with bandwidth issues.

Preparing Yourself for Remote Proceedings/WebEx



Other Hints – continued

- Practice a WebEx appearance with your client and witnesses using a free WebEx account; <https://cart.webex.com/sign-up-webex> Free WebEx account allows meetings with 100 participants, video, screen sharing and a personal room.
- Allow for extra time to appear for Remote Proceedings/WebEx and expect that technology issues may occur
- Prepare to be flexible – technology issues will inevitably happen

Preparing Your Client for Remote Proceedings/WebEx



Remote Proceedings are Still Court

- Remind your client that a remote appearance/WebEx is still Court; they need to act as if they are in Court in person
- Dress appropriately (no pajamas, no hats with Mickey Mouse ears, and put a shirt on)
- Be in an appropriate setting (not walking around, driving a car, laying in bed, or exercising during the proceeding).
- Be mindful of your surroundings (no X-rated magazines on the bedside table or beer cans, screw the Court posters)
- Do not smoke during the proceedings
- Make sure your client corrals the animals (dogs barking in the room and cats walking across their keyboard) before the remote proceedings/WebEx

Preparing Your Client for Remote Proceedings/WebEx



Remote Proceedings are Still Court – continued

- ❑ No one else should be present in the room while your client is attending the remote proceeding/WebEx
- ❑ Do not have children present for the proceedings
- ❑ If the client is testifying, no notes in front of the client -- only the Exhibits
- ❑ If the client is testifying and there are documents that the client needs to refer to (i.e. calendar), have them set the documents aside until needed to refresh their recollection
- ❑ Make sure that your client has access to or copies of all of the Exhibits including the Exhibits for the other Party.
- ❑ Consider uploading your Exhibits and Opposing Party's Exhibits to Dropbox or Google Docs.
- ❑ All electronic devices, other than the one used to access the remote proceeding/WebEx should be turned off during the proceeding

Preparing Your Client for Remote Proceedings/WebEx



Technology Issues

- Practice a WebEx appearance with your client using a free WebEx account
- Show your client how to Join Meeting, Mute, Start Video, open the Chat feature, and view Participants
- Remind client that the default is that once they log into the Court's "Personal Room" that they will be unmuted (audio is on) and they will need to Start Video (video is off)
- Remind client that they should not be sending you messages through the Chat feature while they are on the stand testifying
- Remind client that sending a message to "Everyone" on the Chat feature sends the message to.....everyone; if they want to chat privately with you, they have to select your name from the Chat drop down menu
- If client is having audio/visual issues connecting to WebEx, sometimes it is helpful for them to leave the WebEx meeting and rejoin

Preparing Your Client for Remote Proceedings/WebEx



Technology Issues – continued

- If the attorney is in his/her office, consider having the client or witness come to your office for the Hearing with a separate computer station for the client or witness, so that you or your staff can assist with technology, accessing exhibits, confer during proceedings, etc. Keep in mind that having two computer devices in the same room often creates feedback; you may want to share audio or have your client in a separate room at your office.
- Before the remote proceeding/WebEx, test your client's internet connection and ability to appear by video.
- Pay attention to bandwidth issues; connect by a computer or tablet rather than a phone
- Recommend client turn off all other programs or applications running in the background to improve bandwidth and connectivity issues
- If using computer or laptop for video and cell phone for audio, mute the computer audio so there is no feedback

Preparing Your Client for Remote Proceedings/WebEx



Technology Issues – continued

- Remind client to make sure that their device microphone and webcam are on and the speakers are turned up
- Ask client to mute any other devices that they have in the room so they do not cause a feedback loop
- To reduce background noise, recommend that after confirming audio and video functionality on their device, that client should mute themselves until asked to speak by the Court.
- Client should be prepared to unmute themselves each time he or she is asked to speak and remember to mute when done speaking.
- Remind client to inform the Court if experiencing technical difficulties

Preparing Your Client for Remote Proceedings/WebEx



Other Hints

- Make sure that the client has the WebEx phone number to call into if their video is not working, and the Participant Access Code. No Attendee Id number is need.
- If the sound quality is difficult to hear, instruct client to mute their computer microphone and speakers and call the WebEx conference call number. Client will be able to participate through the telephone connection and observe the video on their computer.
- Remind your client that if they are appearing for a Status Conference or Setting, there may be more than one Status Conference or Setting scheduled at the same time. They should wait until their case is called by the Court.
- Tell your client that they may need to Notify Host if they join by WebEx and Court has not yet begun. They may see a message “Thank you for waiting. We’ll start the meeting when the host joins. Do you want to let the host know you’re waiting?”

Preparing Your Client for Remote Proceedings/WebEx



Other Hints

- Be responsible for your clients and make sure they understand and comply with requirements for remote appearances/WebEx.
- Do not assume your client will just behave appropriately unless you tell them.

Preparing Your Witness for Remote Proceedings/WebEx



Prior to Testifying

- Confirm time and length of remote proceeding/WebEx appearance with witness. Tell the witness what time that you expect that he or she will be called to testify. Remind witness that Court may run longer or more quickly than anticipated so they should be available for the entire time scheduled with the Court.
- Witnesses present but in the background should be identified and excluded from the remote proceeding/room - assuming witnesses are sequestered.
- If witness joins remote proceeding/WebEx prior to his or her testimony, the Court may place the witness in the Waiting Room/Lobby.
- If witness is placed in the Waiting Room/Lobby, the witness may see “[Judicial officer]’s Personal Room, you have been moved to the Lobby. You will join after host admits you.”
- Make sure that the witness has access to or copies of all of the Exhibits including the Exhibits for the other Party. Consider uploading your Exhibits and Opposing Party’s Exhibits to Dropbox or Google Docs and sharing with the witness.

Preparing Your Witness for Remote Proceedings/WebEx



Prior to Testifying

- Practice a WebEx appearance with your witness with a free WebEx account
- Show your witness how to Join Meeting, Mute, Start Video, open the Chat feature, and view Participants
- Remind the witness that the default is that once they log into the Court's "Personal Room" that they will be unmuted (audio is on) and they will need to Start Video (video is off)
- Remind the witness that if they are having audio/visual difficulties, they should call in on the WebEx conference call number. They should mute their computer microphone and speakers and call the WebEx conference call number.

Preparing Your Witness for Remote Proceedings/WebEx



While Testifying

- After the witness joins the remote proceeding/WebEx, the witness will be sworn in by the Court which will include “raise your right hand...”
- No one else should be present in the room while witness is testifying at the remote proceeding/WebEx
- When the witness is testifying on the stand, the witness should have his or her report and Exhibits in front of him or her --- no notes or other documents – the same rules as if the witness was testifying from the witness stand in the Courtroom
- Instruct your witness that if he or she needs to refer to something other than their report or Exhibits to ask If they can look at the other documents (i.e. case file, calendar, other notes) to refresh their recollection
- If the witness is testifying and there are documents that the witness needs to refer to (i.e. case file, calendar, other notes), have them set the documents aside until they are needed to refresh the witness’s recollection

Preparing Your Witness for Remote Proceedings/WebEx



Other Hints

- Make sure that the witness has the WebEx phone number to call into if their video is not working and the Participant Access Code. No Attendee Id number is need.
- Consider how you are going to notify the witness during the Hearing when they are being called to the stand so that they can join the remote proceedings/WebEx (email, texting from your personal cell phone, assistant calls the witness)

Some Recent Case Law



In dependency and neglect case, Respondent Parent's rights were terminated at a termination Hearing held remotely by WebEx. On appeal, Respondent Parent claimed that trial court should have granted request for a continuance so an in-person Hearing could be held and remote Hearing did not afford due process or equal protection of the law. The Court found that the need to conduct the termination Hearing via WebEx did not establish good cause to continue the Hearing. The Court also rejected Respondent Parent's assertions that the remote Hearing procedure failed to afford due process and equal protection of the law. People ex rel. R.J.B., 2020 COA 4, 20CA0859 (Colo. Ct. App. January 21, 2021).

In dependency and neglect case, the Court held a termination hearing and Guardian Ad Litem appeared by WebEx. Respondent Parent objected to the appearance of the GAL by videoconferencing arguing that to "appear" for the minor child meant an in-person appearance and requested a continuance. Trial court denied the motion to continue and allowed GAL to testify by WebEx. The Court affirmed the trial Court's judgment. In re C.L.F., SD36746, SD36748 (Mo. Ct. App. December 18, 2020).